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DATO' SERI ANWAR IBRAHIM

v.

MOHAMAD HANAFIAH HJ ZAKARIA & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-246-2009]
5 JANUARY 2012

C ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Judicial review - Written statement pursuant to s. 51A(1)(c) of the Criminal Procedure Code by Public Prosecutor - Whether a 'decision' - Whether amenable to judicial review - Rules of the High Court 1980, O. 53 r. 2(4)*

D ***JURISDICTION:*** *Proper forum - Civil court - Written statement pursuant to s. 51A(1)(c) of the Criminal Procedure Code ('CPC') by Public Prosecutor ('PP') - Application seeking civil court to review written statement and to direct PP to issue new written statement - Whether abuse of process - Whether civil court had jurisdiction to review* E *act of PP in discharge of obligations under CPC*

The applicant was charged under s. 377B of the Penal Code in a Criminal Case No MTJ3-45-9-2009. Pursuant to s. 51A(1)(c) of the Criminal Procedure Code ('CPC'), the second respondent, the F Public Prosecutor, was required to provide the applicant with a written statement of facts favourable to the defence of the applicant and hence an undated copy of a written statement of facts favourable to the defence of the applicant was served on the applicant. However the written statement states "TIADA". The G applicant stated that this might mean that there were no favourable facts or that there are favourable facts which were being withheld pursuant to the public interest immunity provision under s. 51A(2) of the CPC. Hence the applicant filed an application for leave for judicial review pursuant to O. 53 of the H Rules of the High Court 1980. It was submitted that at the leave stage it was not necessary for the court to delve into the merits of the case but suffice for the applicant to demonstrate that his application was not frivolous or vexatious. It was further submitted that the applicant had been adversely affected by the unlawful I actions of the respondents and that he had the legal right as well as sufficient interest to bring the judicial review application. The

respondents, on the other hand, submitted that the written statement was not a 'decision' which was reviewable under O. 53 r. 2(4) of the RHC and the statement under s. 51A of the CPC was matter within the jurisdiction of the criminal court with which the civil court ought not interfere.

Held (dismissing the applicant's application with costs to be taxed):

(1) The written statement was not reviewable by way of judicial review as it was not a 'decision' within the ambit of O. 53 r. 2(4). Even if it was a 'decision', it was still not a 'decision' amenable to judicial review as the written statement was not a 'decision' that "will lead to administrative action or abstention from action by an authority endowed by law with executive powers". (para 19)

(2) There is no element of finality in the contents of the written statement in that it did not in any way conclusively determine the rights of the applicant to pursue his defence. The court hearing the case against the applicant was not bound by the written statement and the applicant was at liberty to raise objections to the written statement in the trial. The final decision whether or not there are facts favourable to the applicant or whether the two medical reports are favourable to the applicant will be made by the trial judge. Hence the applicant's right to a fair trial has not been adversely affected by the written statement. (para 20)

(3) Further, the civil court exercising its administrative law function is not the proper forum to review a written statement issued for the purpose of a trial pending in the criminal court. It was an abuse of process to seek the aid of the civil court to review the written statement and to direct the first respondent to issue a new written statement. The civil court had no jurisdiction to review any act of the Public Prosecutor undertaken in the discharge of his obligations under the CPC. Any challenge ought to be raised in the criminal court exercising its criminal jurisdiction. To allow the application would mean the civil court interfering with the jurisdiction of the criminal court. *Tan Sri Eric Chia v. Peguam Negara* (refd). (para 21)

(4) The conduct of the prosecution is the sole responsibility of the Public Prosecutor. Under s. 51A(1)(c) it is within the purview of the Public Prosecutor to form an opinion whether there were facts favourable to the applicant upon assessment of the investigation papers and not merely on the two medical reports. To subject actions taken by the Public Prosecutor under s. 51A(1)(c) to judicial review would amount to interfering with the Public Prosecutor's discharge of his obligation. The aid of the court ought not to be invoked, at the pre-trial stage, to review what facts were favourable to the applicant's defence. That would give rise to an untenable situation where the court was asked to form an opinion on evidence even before the trial commenced. Nevertheless, irrespective of the written statement, the Public Prosecutor was not in any way relieved from the burden of proving a *prima facie* case against the applicant. (para 23)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

City Growth Sdn Bhd & Anor v. Kerajaan Malaysia [2005] 7 CLJ 422 HC ***(refd)***

Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 10 CLJ 111 HC ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1985] 1 AC 374 ***(refd)***

Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Mohd Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

MW Zander (M) Sdn Bhd v. Director General of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***

PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***

Tan Eng Chye v. The Director of Prisons (No. 2) [2004] SLR 521 ***(refd)***

Tan Sri Eric Chia v. Peguam Negara [2005] 5 CLJ 450 HC ***(refd)***
Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 5 CLJ 153 CA ***(refd)***
Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 ***(refd)***
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 51A(1)(c), (2)
Federal Constitution, arts 5, 8
Penal Code, s. 377B
Public Authorities Protection Act 1948, s. 2(b)
Rules of the High Court 1980, O. 53 r. 2(4)

Other source(s) referred to:
Ratanlal & Dirajlal's Law of Crimes, vol 2, 1998

For the applicant - Edmund Bon (Amer Hamzah Arshad, Leela J Jesuthasan & Joanne Leong with him); M/s SN Nair & Partners
For the respondents - Azizah Nawawi (Shamsul Dato' Sulaiman with her) SFCs

Reported by Shankar Krishna

JUDGMENT

Aziah Ali J:

[1] The applicant is a Member of Parliament for the Permatang Pauh constituency and is the Opposition Leader in Parliament. The applicant is charged under s. 377B of the Penal Code in Criminal Case No. MTJ3-45-9-2009 at the High Court of Malaya, Kuala Lumpur. The trial has been fixed from 25 January 2010 until 25 February 2010. Under s. 51A(1)(c) of the Criminal Procedure Code (the CPC) the second respondent is required to provide the applicant with a written statement of facts favourable to the defence of the applicant.

[2] Pursuant to s. 51A(1)(c) of the CPC the first respondent, who is a Deputy Public Prosecutor at the Attorney-General's Chambers, signed an undated copy of a written statement of facts favourable to the defence of the applicant ('*Kenyataan Bertulis* Mengenai Fakta-Fakta Yang Memihak Kepada Pembelaan') which

was served on the applicant's solicitors on 24 June 2009. The written statement states "TIADA" (exh. DSAI7). The applicant says that this may mean that there were no favourable facts, or it may also mean that there are favourable facts which are being withheld pursuant to the public interest immunity provision in s. 51A(2) of the CPC. Either way, the applicant says that it is judicially reviewable.

[3] The applicant filed this application for leave for judicial review pursuant to O. 53 of the Rules of the High Court 1980 ("the RHC"). The reliefs the applicant is seeking in the judicial review application are as follows:

A. In respect of the first, second and third respondents:

(a) Declaratory order that the undated written statement of favourable facts which was served to the applicant on 24 June 2009 in the matter of the High Court of Malaya in Kuala Lumpur, Criminal Case No. MTJ3-45-9-2009 did not comply with s. 51A(1)(c) of the Criminal Procedure Code (CPC), is null and void;

(b) Order of *certiorari* to nullify and set aside the undated written statement of favourable facts which was served to the applicant on 24 June 2009 in the matter of the High Court of Malaya in Kuala Lumpur, Criminal Case No. MTJ3-45-9-2009.

B. In respect of the first and second respondents:

(a) Prohibition order to prohibit the first and second respondents from conducting or continuing the prosecution and/or any proceedings against the applicant until all facts favourable to defence in the form of a written statement of facts favourable to the defence of the accused pursuant to s. 51A(1)(c) of the CPC given to the applicant in the matter of High Court of Malaya in Kuala Lumpur, Criminal Case No. MTJ3-45-9-2009;

(b) Injunction against the first and second respondents from conducting or continuing the prosecution and/or any proceedings against the applicant until all facts favourable to defence in the form of a written statement of facts

favourable to the defence of the accused pursuant to s. 51A(1)(c) of the CPC given to the applicant in the matter of High Court of Malaya in Kuala Lumpur, Criminal Case No. MTJ3-45-9-2009;

(c) Order to stay all actions and/or continuing the prosecution and/or any proceedings by the first and second respondents against the applicant until the disposal of the judicial review application.

C. In respect of the second respondent:

(a) Order of *mandamus* to supply to the applicant all facts favourable to defence in the form of a written statement of facts favourable to the defence of the accused pursuant to s. 51A(1)(c) of the CPC in the matter of High Court of Malaya in Kuala Lumpur, Criminal Case No. MTJ3-45-9-2009.

D. The applicant is also seeking damages, costs and other consequential reliefs.

Submissions For The Applicant

A Good Arguable Case

[4] Counsel for the applicant submits that leave should be granted if the applicant can demonstrate an arguable case which merits further investigation on an *inter partes* basis, and that *prima facie*, the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application (*Association of Bank Officer, Peninsula Malaysia v. Malaysian Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; *Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 10 CLJ 111; *Tuan Hj Sarip Hamid v. Patco Malaysia Bhd* [1995] 3 CLJ 627). It is submitted that at the leave stage it is not necessary for the court to delve into the merits of the applicant's case but suffice for the applicant to demonstrate that his application is not frivolous or vexatious (*YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210). Counsel submits that all that the court ought to consider at this stage is whether the application discloses important questions on challenging the undated statement of favourable facts. It is

submitted for the applicant that the fact that this application involves a novel point of law on its own merits leave to be granted.

Locus standi

[5] It is submitted that the applicant has been adversely affected by the unlawful actions of the respondent and that he has a legal right as well as sufficient interest to bring the judicial review application (*QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor (supra)*. It is submitted that the charge against the applicant under s. 377B of the Penal Code has been expressly framed stating the alleged act, *ie*, "... dengan memasukkan zakar kamu ke dalam duburnya ...". To constitute an offence under the said section, there must therefore be penetration which is the main and core ingredient of the alleged offence. Penetration must be strictly proven and medical evidence of such fact is a requirement. Counsel submits that the favourable facts include (but not limited to) the reports from Pusrawi Hospital dated 28 June 2008 (exh. DSAI8) and the report from Kuala Lumpur Hospital dated 13 July 2008 (exh. DSAI9). It is submitted that based on the conclusions in the two medical reports the main element in the charge against the applicant would not be proved. (*Ratanlal & Dirajlal's Law of Crimes*, vol. 2 1998).

Test To Be Applied

[6] It is submitted that the question under s. 51A(1)(c) of the CPC of facts favourable to the defence of the accused requires an objective test and not the subjective satisfaction or opinion of the Public Prosecutor (*Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; *Mohd Ezam Mohd Noor v. Ketua Polis Negara & Others Appeals* [2002] 4 CLJ 309). Counsel submits that the first and second respondents have committed procedural impropriety and/or made an irrational/unreasonable decision which is not proportional in respect of the objective facts in issuing the written statement.

[7] It is further submitted that the first and second respondents failed to adhere to and failed to discharge the burden under the Attorney-General's guidelines which states as follows (exh. DSAI6):

Segala fakta yang ada dalam kertas siasatan yang boleh membantu pihak tertuduh harus dikaji dengan teliti. Beban pembekalan fakta yang memihak kepada pihak tertuduh adalah terletak di atas bahu pendakwaan. Kegagalan berbuat demikian akan mengundang inferences di bawah seksyen 114(g) Akta Keterangan 1950 terhadap kes pendakwaan.

Apabila membekalkan fakta yang boleh membantu pihak pembelaan, TPR harus juga menyatakan nama saksi yang terlibat serta alamatnya bagi membolehkan pihak tertuduh menghubungi saksi tersebut (jika diperlukan).

Infringement Of Arts. 5 And 8 Of The Federal Constitution

[8] Counsel submits that the applicant is entitled to a fair trial under the Federal Constitution and under the law the applicant is entitled to a true and correct statement of favourable facts so that he can defend himself properly and fully. The act/decision of issuing the statement is, on an objective basis, wrong, unfair and disproportionate to the facts of the case. Hence the applicant's constitutional right to a fair trial as provided in art. 5 and the right to equal protection under the law in art. 8 of the Federal Constitution have been violated (*Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93; *Lee Kwan Woh v. PP* [2009] 5 CLJ 631).

[9] Further it is submitted that the legislative policy behind the new provision s. 51A confers a legitimate expectation on the applicant that the second respondent would act fairly and justly to state all facts favourable to the accused/applicant (*PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862).

Submissions For The Respondents

[10] The Senior Federal Counsel for the respondents urged the court to refuse the applicant's application for leave on the grounds that:

(i) the written statement issued by the first respondent is not a 'decision' which is reviewable under O. 53 r. 2(4) of the RHC; and

(ii) the statement issued under s. 51A of the CPC are matters within the jurisdiction of the criminal courts which the civil courts ought not interfere with.

A **There Is No 'Decision' That Is Reviewable Under O. 53 r. 2(4)**

[11] Learned Senior Federal Counsel submits that in an application for judicial review, it is imperative to ascertain the 'decision' that the applicant seeks to impugn (*Abdul Rahman*
B *Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805). Counsel submits that in this case, the written statement is not a 'decision' within the ambit of and which is reviewable under O. 53 r. 2(4) of the RHC. It is submitted that the first respondent did not make any decision that will lead to
C administrative action or abstention from action. (*Council of Civil Service Unions v. Minister for Civil Service* [1985] 1 AC 374). As there was no 'decision', then the applicant cannot be said to be adversely affected by it. Hence it is submitted that this application is frivolous and vexatious and ought to be dismissed as the
D applicant has failed to comply with the mandatory requirement of O. 53 r. 2(4) as there is no 'decision' that the applicant is seeking to impugn.

[12] It is submitted that that under s. 51A(1)(c) the first
E respondent is required to consider the totality of the evidence available. Having considered the totality of the evidence available in the case, the first respondent was of the opinion that there was no fact favourable to the applicant. The first respondent had merely formed an opinion. Counsel submits that the forming of an
F opinion by the first respondent is not reviewable in court (*R v. Sloan* [1990] 1 NZLR 474; *MW Zander (M) Sdn Bhd v. Director General of Inland Revenue* [2005] 6 CLJ 336).

The Written Statement Is Not A 'Final Decision'

G **[13]** Counsel submits that the opinion expressed by the first respondent in the written statement did not conclusively determine the rights of the applicant nor does it affect any rights of the applicant to pursue his defence in the trial before the court (*R v. Sloan (supra)*). It is submitted that for a decision to be reviewable
H there must be finality to such decision (*Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 5 CLJ 153). In the instant case the final authority to decide whether there are facts favourable to the defence or otherwise and relevant for the purpose of the trial lies with the criminal court. It is
I submitted that the written statement is not justiciable. Hence no leave ought to be granted.

Civil Court Should Not Interfere With Matters Within The Jurisdiction Of The Criminal Courts

[14] It is submitted that this application is an abuse of process as the applicant is asking this court, which is a civil court exercising its administrative law function to review the written statement issued pursuant to s. 51A of the CPC for the purposes of the criminal trial now pending before the Criminal High Court. Counsel submits that this court being a civil court has no jurisdiction to review proceedings before the criminal court exercising its criminal jurisdiction. It is submitted that whatever issues pertaining to the written statement can be raised during the criminal trial proceedings. This application to question and to review the proceedings in the criminal court by means of civil proceedings for an order of *certiorari*, declaration and mandamus is an abuse of the civil court's jurisdiction (*Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; *City Growth Sdn Bhd & Anor v. Kerajaan Malaysia* [2005] 7 CLJ 422; *Tan Eng Chye v. The Director of Prisons (No. 2)* [2004] SLR 521). If the court is of the opinion that this court is not the proper forum, then leave ought not to be granted.

Submissions In Reply

[15] Counsel for the applicant submits that it is illogical for the respondents to say that there was no 'decision' made by the first respondent as there was a written statement. It is submitted that there was a decision but the reasoning process was flawed. The submissions made by learned Senior Federal Counsel is a statement from the Bar as there is no affidavit from the first respondent to explain the process. It is further submitted that the written statement is to be given to the applicant as of right and the objective test applies. Where it is clear that there are facts favourable to the accused, the written statement must be given. Counsel submits that applying the objective test, it is clear that on the face of the two medical reports there are facts favourable to the applicant which are not stated in the written statement. The first respondent has to clarify whether the written statement was issued under s. 51A(1)(c) or s. 51A(2) of the CPC. With regard to the jurisdiction of this court to hear this application, it is submitted that though the courts in Kuala Lumpur are specialised, the issue is irrelevant as there are only two High Courts in Malaya and Sabah and Sarawak.

Decision

[16] Section 51A(1)(c) imposes an obligation on the Public Prosecutor at the pre-trial stage to deliver to an accused person a written statement of facts favourable to his defence. Section 51A(1)(c) states as follows:

> **Delivery of certain documents**
>
> 51A. (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:
>
> (a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;
>
> (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and
>
> (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.
>
> (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

[17] The matter under complaint is the written statement issued by the first respondent wherein the first respondent stated 'TIADA'. From the written statement itself there is no doubt that it was issued pursuant to s. 51A(1)(c) of the CPC. In essence the applicant claims that the first and second respondents had committed procedural impropriety by issuing the written statement without properly considering the evidence available and challenges the written statement as being, amongst others, made *mala fide*, wrong, null and void. The applicant contends that the written statement issued is irrational and disproportionate to the facts of the case and as an example refers to the two medical reports which the applicant says contain facts favourable to the defence.

[18] The primary question to be determined is the contention for the respondents that the written statement issued by the first respondent under s. 51A(1)(c) is not reviewable by way of judicial review as it is not a 'decision' within the ambit of O. 53 r. 2(4). In *CCSU v. Minister for Civil Service (supra)* p. 408 Lord Diplock said:

> Judicial review, ... provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.
>
> For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers ...

[19] Having considered the provisions of s. 51A(1)(c) and the submissions made, I agree with learned Senior Federal Counsel that the written statement is not a 'decision' within the ambit of O. 53 r. 2(4) and is therefore not amenable to judicial review. Learned Senior Federal Counsel submits that it is an opinion. To my mind even if the written statement is a 'decision' as submitted by learned counsel for the applicant, it is still not a 'decision' amenable to judicial review as the written statement is not a 'decision' that 'will lead to administrative action or abstention from action by an authority endowed by law with executive powers'.

[20] There is no element of finality in the contents of the written statement. The written statement does not in any way conclusively determine the rights of the applicant to pursue his defence. The fact that despite the medical reports the first respondent had stated 'TIADA' in the written statement does not amount to procedural impropriety. The court hearing the case against the applicant is not bound by the written statement. By the written statement, the first and second respondents have made known to the applicant that they do not consider the two medical reports as being favourable to the applicant's defence and the applicant is thereby put on notice. The applicant is at liberty to raise objections to the written statement in the trial itself. The remedy is available before the criminal court during the trial process. The final decision whether or not there are facts favourable to the applicant or whether the two medical reports are favourable to the applicant will be made by the trial judge. Hence the applicant's right to a fair trial has not been adversely affected by the written statement.

[21] Further I agree with the Senior Federal Counsel that the civil court exercising its administrative law function is not the proper forum to review a written statement issued for the purpose of a trial pending in the criminal court. It is an abuse of process to seek the aid of the civil court to review the written statement and to direct the first respondent to issue a new written statement. The civil court has no jurisdiction to review any act of the Public Prosecutor undertaken in the discharge of his obligations under the CPC. Any challenge ought to be raised in the criminal court exercising its criminal jurisdiction (*Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63). To allow this application would mean the civil court interfering with the jurisdiction of the criminal court (*Tan Sri Eric Chia v. Peguam Negara* [2005] 5 CLJ 450).

[22] Counsel for the applicant has urged the court to refer to the Hansard. It is permissible for the courts to resort to the Hansard as an aid to interpretation (*Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285). The speech of the Honourable Minister of Home Affairs as reported in the Hansard explains the purpose of s. 51A. However in so far as s. 51A(1)(c) is concerned, there is no indication from the Hansard that the defence can seek the aid of the court to determine what facts obtained in the course of investigations are favourable to the defence and ought to be delivered to the defence.

[23] The conduct of prosecutions is the sole responsibility of the Public Prosecutor. I agree with the Senior Federal Counsel that under s. 51A(1)(c) it is within the purview of the Public Prosecutor to form an opinion whether there are facts favourable to the applicant upon assessment of the investigation papers and not merely on the two medical reports. The investigation papers are not available to the courts. To subject actions taken by the Public Prosecutor under s. 51A(1)(c) to judicial review would amount to interfering with the Public Prosecutor's discharge of his obligation. The aid of the court ought not to be invoked, at the pre-trial stage, to review what facts are favourable to the applicant's defence. That would give rise to an untenable situation where the court is asked to form an opinion on evidence even before trial commences. It has to be borne in mind that irrespective of the written statement, the Public Prosecutor is not in any way relieved from the burden of proving a *prima facie* case against the applicant.

[24] For the aforementioned reasons I find that this application is frivolous and vexatious and an abuse of process. The application is therefore dismissed with costs to the respondents to be taxed on a solicitor-client basis pursuant to s. 2(b) of the Public Authorities Protection Act 1948.